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Canada: non-paper

1. The issue of "return of assets" will be important in the context of the negotiation of a United Nations Convention against Corruption. In the past, corrupt officials have appropriated massive amounts of state funds for their own use and moved such funds abroad. It is to be expected that a key concern of some States will be to examine how such assets can be returned. Other States have pointed out the evidentiary and legal challenges that may be involved in the return of assets. Discussions have been somewhat complicated by the fact that some have wished to characterize the issue as one of "illegal transfer of funds," while others—including Canada—have noted that the transfer involved is often not illegal and have preferred to speak of "transfer of illicitly obtained funds". It has occurred to the Canadian delegation that one of the reasons the discussion of the issue has been rather unsatisfactory is that the issue described as "return of assets" in fact covers a number of legally separate situations. Some of those situations are legally simpler than others and may be more amenable to agreed international action. The more complex situations may well be subjects worthy of discussion, but it is important to be aware of their complexities. By trying to separate the legal situations, starting at what appears to be the most straightforward legal situation and moving on to progressively more complex matters, Canada hopes that the present paper can help clarify the conceptual framework for discussions on the issue and provide useful food for thought.

1. Theft of state property or funds by high government officials

2. This is a key concern for some countries and is also conceptually the simplest issue. The legal owner of the money or property is the State of origin, the crime that has occurred is theft and the State of origin of the official is the clear victim of the crime. Most legal systems will acknowledge that stolen property should normally be returned to its rightful owner and will contain provision for doing so: those

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provisions may be part of the State's civil, administrative or criminal law system. The fact that the rightful owner is a foreign State should not prevent the return of such property. The theft will usually take place in only one jurisdiction. The transfer of the property from the State of origin may be either legal or illegal, but movement of the property outside its State of origin—rather than the nature of the crime or of the transfer—will be the source of the international aspect of the case.

Challenges

3. There may well be evidentiary challenges in showing that the property claimed is indeed the stolen property of a foreign Sate. All legal systems will require proof that property is stolen before they can attempt to return it to its owner. Proof of ownership by the foreign State may be difficult, especially if the stolen property or funds have been mingled with property from other sources. Some of the stolen funds may be dispersed and there may be other legitimate claimants on the property or funds remaining. The principle that stolen property should be returned to its owner should be generally acceptable, however.

2. Proceeds of corruption (bribes, etc.) obtained by high government officials

4. This situation is more complex. The property is not usually stolen, but is rather illicitly obtained property or funds, which will usually have been given willingly to the corrupt official by the original owner. The original owner has probably engaged in a crime by offering the bribe. In that respect such proceeds of criminal activities more closely resemble illicit drug money than stolen property. In many situations, the State of origin of the official can be regarded as a victim of the crime, in the sense that law and good governance are undermined, but there may be other victims, such as those who lose business they would otherwise have won because they would not pay a bribe; individuals who must pay bribes to obtain services that should legally be freely available; or the persons paying the bribe may even attempt to argue that the money was extorted and that they are the victims. In addition to the transnational movement of the property, which may be licit or illicit, the crime itself may have a transnational aspect, with a bribe offered or paid abroad or by a foreign-based person or enterprise.

Challenges

5. The funds or property located might usefully be viewed in the same context as drug money: both the official and the original owners are malefactors. There may evidentiary challenges in proving that funds are the proceeds of corruption. If proved, however, neither the official nor the person who paid the bribe—the original legal owner—should obtain the property. However, just as the identity of the victim may differ depending on the fact pattern, the final recipient of those proceeds may vary. In most countries, the proceeds of crime will revert to the State following prosecution. There may be legitimate claimants on the property of the official (unpaid employees or other creditors) unconnected with the crime who may have the opportunity to enforce their claim. As well, many States have legal provision for sharing such proceeds with other States, usually on the basis of assistance in the prosecution of the crime. Models relating to the freezing, seizure and sharing of

proceeds of crime could be useful models to examine in the context of this type of proceeds of corruption.

3. Proceeds of contracts corruptly obtained from a domestic or foreign official

6. This situation is more complex. In most States, active bribery—the offering of a bribe to a domestic official—is a crime and in a number of States the offering of a bribe to a foreign official is also a crime. However, not all States deal with the proceeds of illicitly obtained contracts as proceeds of crime in the same manner as, for example, drug money. The funds involved are on the face of things the proceeds of a legal contractual activity: the manner of obtaining the contract is, however, illicit. If the corruptly obtained contract is not fulfilled, is fulfilled in a substandard manner or was unnecessary, the State of origin of the official can, as in the case above, be regarded as the victim. Competitors who have lost business because of an unwillingness to pay bribes may also be regarded as victims. A corporation involved in such a contract may argue that it is not responsible for the illegal activities of its employees or agents and present itself as a victim to the extent it is subject to sanction. In the case of active bribery of a domestic official, the matter may have a transnational aspect to the extent the funds involved are transferred from their country of origin. If funds are transferred, they may be transferred legally or illegally. In the case of active bribery of a foreign official, there is by definition a transnational aspect.

Challenges

7. The evidentiary challenges related to identifying proceeds of corruptly obtained contracts may be very great, as the funds may often be co-mingled with the proceeds of legitimately obtained contracts. This will be additional to the evidentiary burden to be met in proving the active bribery. To the extent that a corporation is involved, difficult issues of corporate criminal or administrative responsibility may arise. To the extent that one is dealing with an ongoing business, in the normal course of commercial life there will be numerous other claimants on the assets of such a business. To the extent that States choose to deal with the proceeds of corruptly obtained contracts as proceeds of crime, most of the comments in section 2 above apply.

4. Corruption of a private person with a duty to another private person

8. In the case of the bribery or corruption of an agent or employee by a third person, it is not clear that any State will have a claim on the property involved. The matter may be dealt with under private law, as a breach of contract or of fiduciary duty, and in many situations the principal or employer will have a claim on the assets involved. If the individual who has accepted bribes is prosecuted, he or she may be fined by the State prosecuting. In such a circumstance, the bribes paid may also be regarded as proceeds of crime. The victim is the private person or corporation to whom the corrupt employee or agent owed a duty. That person may be a national of a foreign State. The crime may also have a transnational aspect if

the bribe is paid from abroad or the money obtained is moved to another country. If funds are transferred, they may be transferred legally or illegally. However, given that the relationships involved are private ones, it is not clear that a transnational aspect to such corruption and its proceeds is a key consideration.

Challenges

9. Evidentiary issues can be complex and some States will approach this as primarily a private law issue. However, an important question to be asked in the context of such "private-to-private corruption" is whether the issue of return of assets, with its focus on the interest of a State other than the State in which the funds or property are found, has any application. Are the interests involved primarily those of private individuals who can pursue them individually?

Comments

10. The present paper is offered as food for thought, in the hope that it can help identify areas in the discussion on "return of assets" where progress can be made most easily. This may be simplest where there is a clear property interest in the assets by the State of origin of the corrupt official. Where the property interest is less clear and where there are more legitimate third-party claimants, an approach based on models dealing with proceeds of crime may prove fruitful. In every situation, evidentiary issues will be of key importance. Depending on the facts and the type of corrupt activity that has generated the assets, the identification of victims may be more or less complex. Even where victims are identified, justice systems do not offer compensation to victims of crime in all circumstances. Finally, the present non-paper is presented by Canada in the hopes that it will encourage discussion on the issue in the future, including of other approaches to the issue of return of assets not followed here.